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In the Supreme Court of the United States

OCTOBER TERM, 1979

LAWRENCE B. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO, PETITIONER

v.

JACQUELINE NOLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether, consistent with the federal Aid to Families with Dependent Children (AFDC) program, a state may consider a natural parent's community-property interest in the income of his or her spouse in determining the amount of the AFDC grant to the natural parent's children, where the spouse is the children's stepparent and is neither legally obligated to support the children nor actually supporting them.

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) program (Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.*) was enacted by Congress in 1935. The purpose of the AFDC program is to encourage the care of needy dependent children in their own homes or those of relatives in order to help maintain and strengthen family life and to assist such parents or relatives to attain self-sufficiency. 42 U.S.C. 601. The AFDC program is "based on a scheme of cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316 (1968). Participation in the program is optional with the states, but states that elect to provide AFDC benefits to their residents receive substantial reimbursement from the federal government on a matching-fund basis. 42 U.S.C. 603(a). States participating in the AFDC program must submit for federal approval a State Plan that meets all requirements of Title IV-A and its implementing regulations. 42 U.S.C. 601, 602(a) and (b).

New Mexico participates in the AFDC program and has an approved State Plan.[1] Under this Plan, New Mexico employs a three-step process in computing

[1]On June 4, 1976, the regional office of HEW approved an AFDC State Plan amendment containing the New Mexico regulations challenged herein. This approval apparently did not contemplate a situation, such as presented here, involving the attribution of community property in a case in which a stepparent is not legally obligated to support his stepchildren. In any event, such State Plan approval by the regional office does not conclusively determine the validity of a State Plan under the AFDC program. See *King* v. *Smith*, *supra*, 392 U.S. at 333 n.34. The Department of Health, Education, and Welfare is in the process of considering possible measures, depending on the outcome of this action and similar litigation in state court (see note 3 and page 11, *infra*), to bring the New Mexico State Plan into line with federal requirements. See *Rosado* v. *Wyman*, 397 U.S. 397, 406 & n.8 (1970).

eligibility for and the amount of an AFDC grant. First, the State determines the needs of the AFDC "budget group," which by state regulation includes all individuals in a household applying for or receiving AFDC benefits. Once the need standard for the "budget group" is determined, the State subtracts therefrom all income that it considers to be available to the "budget group." The AFDC grant for the "budget group" is then computed as a percentage of the remaining unmet need, if any, and the State pays that amount to the recipients.

Section 221.832 of the New Mexico Health and Social Services Department (H.S.S.D.) Manual (Pet. 3-4) sets forth the State's rules for determining the income available to a "budget group" in a household where the children receive AFDC payments but their natural parent does not. Those rules provide that all of the income of the natural parent is considered to be available to the "budget group," except for certain exclusions and allowances including $49 per month that the State allows for the parent's own maintenance and support. The rules further provide that one-half the community-property income of spouses is considered available to each spouse when they live together. In this way, a portion of the income earned by the natural parent's spouse is automatically considered to be available for the support of the "budget group" even though the spouse is neither legally obligated to support the children nor actually contributing to their support (Pet. App. 4a-5a, 10a-11a).

2. The stipulated facts in this case show that respondent is the mother of three minor children who have been receiving AFDC assistance from New Mexico since 1971. She is divorced from the children's natural father and has

remarried. Respondent's spouse has not adopted her children and, as their stepfather, is not legally obligated under New Mexico law to support them. For purposes of AFDC, the household consists of respondent, her three children, and her spouse. Neither respondent nor her spouse receives AFDC payments, and thus the "budget group" is comprised only of respondent's three children (Pet. App. 3a-4a, 7a-8a).

At all times relevant to this action, respondent was a full-time student who received no wages or pay of any kind. Respondent's spouse was also a full-time student. However, he received some income in the form of wages from a part-time job and a monthly check from the United States under the G.I. Bill. Respondent's spouse does not voluntarily or regularly provide support to respondent's children (Pet. App. 3a-4a, 7a-8a).

Through October 1976, New Mexico computed the AFDC grant for respondent's three children to be $163 per month. This was based on a need standard of $189 per month and an assistance grant of 86% of need. Since respondent and her children neither received nor were deemed to receive any income, there was no income reduction in the children's AFDC grant. However, on October 4, 1976, the State notified respondent that, effective November 1976, the AFDC grant for her three children would be reduced from $163 per month to $2 per month pursuant to a new regulation (H.S.S.D. § 221.832, *supra*) that treated one-half the income of respondent's spouse as being available to respondent.[2] At no time,

[2]The revised AFDC amount was computed by attributing to respondent one-half ($235.67) of the income ($471.34) of her spouse, subtracting $49 for respondent's maintenance and support, and deducting that result from the children's need standard of $189 per month. The AFDC grant was then calculated as 86% of that difference ($2.33), or $2 per month.

either before or after the State's notice to respondent that her children's AFDC grant was being reduced, did the State determine that the income of respondent's spouse was actually available to respondent or her children. Indeed, it is undisputed in this litigation that respondent's spouse did not voluntarily and regularly make available any of his income to meet the needs of respondent's children (Pet. App. 4a-5a, 8a).

3. On October 28, 1976, respondent filed this suit on behalf of herself and her three minor children in the United States District Court for the District of New Mexico. Respondent challenged the reduction of the AFDC grant to her children on the grounds that the New Mexico community-property regulation is inconsistent with 42 U.S.C. 602(a), 45 C.F.R. 233.20(a)(3)(ii)(D), and 45 C.F.R. 233.90(a), and therefore invalid under the Supremacy Clause, and that the state regulation is contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court, after preliminarily enjoining New Mexico from applying the challenged state regulation to respondent's children, granted summary judgment in favor of respondent on her Supremacy Clause claim and permanently enjoined the operation of the regulation to reduce the AFDC grant to her children (Pet. App. 1a-6a). On the State's appeal, the court of appeals unanimously affirmed in a per curiam opinion (*id.* at 7a-12a).

DISCUSSION

Under New Mexico's AFDC regulation regarding community property, a natural parent's community-property interest in the income of his or her spouse is considered as income available to the parent for the

support of his or her children. This regulation applies even though the spouse, as the children's stepparent, has no legal obligation under state law to provide support for the children and does not in fact contribute to their support. In our view, this treatment of income is inconsistent with federal AFDC requirements and is thus invalid under the Supremacy Clause.[3]

It is beyond dispute that New Mexico could not directly deem the stepparent's income to be available to the children in this case. Rather, federal law provides that, in the absence of proof of actual contributions, a child may be considered to have available the income only of a natural parent, an adoptive parent, or a stepparent ceremonially married to a natural or adoptive parent and legally obligated to furnish support under a state law of general applicability that requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. See 45 C.F.R. 233.90(a) (Pet. 5-6). See also 42 U.S.C. 602(a)(7);

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[3]In addition to this federal issue, petitioner also presents (Pet. 2) two questions concerning the application of New Mexico's community-property regulation and the validity of that regulation under state law. We express no views on these issues of state law, and we assume for purposes of this submission that, as a matter of New Mexico law, the regulation is valid and was properly applied in this case. We do note that the New Mexico Supreme Court currently has before it a case that raises these questions of state law (as well as the federal issue presented in the instant case). *Harper* v. *New Mexico Department of Human Services*, No. 4392 (N.M. Ct. App.), certification to the New Mexico Supreme Court (Mar. 5, 1980) (Pet. Supp. App. 13a-14a). See also page 11, *infra*. Of course, the invalidity of New Mexico's AFDC regulation under state law would obviate the need to consider the validity of the regulation as a matter of federal law.

Van Lare v. *Hurley*, 421 U.S. 338 (1975); *Lewis* v. *Martin*, 397 U.S. 552 (1970); *King* v. *Smith*, 392 U.S. 309 (1968). Since the stepparent here is neither contributing to the children's support nor legally obligated to do so, his income cannot, as a matter of federal law, be considered by the State to be available to his stepchildren.[4]

New Mexico seeks to avoid this settled principle by treating a portion of the stepparent's income to be available to his spouse (the children's natural mother) under the State's community-property law and therefore derivatively available to the children. The State relies (Pet. 9, 11) on federal regulations to the effect that the available income of a parent legally responsible for support is considered to be available to the parent's minor children (45 C.F.R. 233.20(a)(3)(vi), Pet. 5; 45 C.F.R. 233.90(a), Pet. 6) and that income is considered available to the parent when he or she "has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance" (45 C.F.R. 233.20(a)(3)(ii)(D), Pet. 5).[5] In the State's view, the amount attributable to a natural parent "through [his or] her community income property rights" (Pet. 11) satisfies this standard of available income.

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[4]Of course, any actual contributions by a stepparent to the support of his or her stepchildren could properly be considered in determining the children's AFDC eligibility or the amount of their assistance grant.

[5]Although 45 C.F.R. 233.20(a)(3)(ii)(D) refers to the income available to an AFDC "applicant or recipient," HEW has no separate regulation governing cases where, as here, the natural parent is not herself an applicant or recipient, (see page 4, *supra*), and in such cases the agency would look to 45 C.F.R. 233.20(a)(3)(ii)(D) in determining available income.

We disagree. Even assuming that state law entitles the natural parent to sue during the course of the marriage to obtain his or her share of the community property,[6] 45 C.F.R. 233.20(a)(3)(ii)(D) does not encompass inchoate legal causes of action as available income for purposes of AFDC. This interpretation is clearly established by the administrative history of the regulation. In 1973, HEW issued a Notice of Proposed Rulemaking to amend its regulations as follows:

> [N]et income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest therein and has the legal ability to make them available but does not do so.

38 Fed. Reg. 18254 (1973).[7] The Notice stated that the proposed amendment would "clarify that available income and resources include those which are available to the client, e.g., *through a legal interest in community property* or a trust, even though he does not secure them"

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[6]The State has cited no authority that would permit one spouse to sue the other for his or her portion of the community property during the marriage.

[7]At the time of the proposed rulemaking, the existing provision stated:

> [O]nly such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

45 C.F.R. 233.20(a)(3)(ii)(*c*) (1973).

(*ibid.*; emphasis added). However, HEW subsequently modified the regulation to its current form in light of public comments that

> raised a valid criticism with respect to the interpretation of the phrase "currently available." The language of the regulation was clarified so that the reference regarding consideration of a legal interest in income or resources is *a reference to a liquidated sum and not to an uncollected judgment such as a child support order which has not been paid. The regulations were revised to recognize the distinction which exists between that which is actually available and those resources which exist only in the form of unliquidated legal causes of action.*

40 Fed. Reg. 30963, 30964 (1975) (emphasis added). Thus, based on the notice-and-comment procedure, and expressly to conform to the decisions of this Court (*ibid.*), the regulation as finally adopted was designed generally to exclude from available income "resources which exist only in the form of unliquidated legal causes of action," and particularly "income * * * available * * * through a[n inchoate] legal interest in community property."

Moreover, the State's construction of 45 C.F.R. 233.20(a)(3)(ii)(D)—that children's AFDC benefits may be reduced or even terminated simply because their natural parent can commence litigation to obtain his or her share of the community property—does not accord with the remedial purpose of the AFDC program. Such a view ignores the fact that substantial disagreements may be presented concerning the definition of community property and the amount of the natural parent's rightful

claim,[8] that litigation may remain pending for many years, that further proceedings may be necessary to enforce an initial judgment awarding community property to the natural parent, and that myriad other legal and practical difficulties may serve in fact to make the community-property interest unavailable as support. For these reasons, New Mexico's community-property regulation would allow needy and dependent children to be deprived of necessary AFDC funds that have not actually been replaced by any community-property income deemed to be available—precisely the evil sought to be avoided by the federal AFDC requirements and the decisions of this Court.

Finally, no conflict currently exists on this issue that warrants resolution by the Court. The position we urge is consistent with the only decision of which we are aware outside New Mexico that addresses the question. See *Camp* v. *Swoap*, 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (1979), in which the state court of appeals invalidated on Supremacy Clause grounds a California AFDC regulation that, like the New Mexico regulation at issue here, treated a natural parent's community-property interest in his or her spouse's income as available to support the natural parent's children. Cf. *Reyna* v. *Vowell*, 470 F. 2d 494, 496 (5th Cir. 1972) (Texas' attribution of income of minor child to parent cannot serve to reduce AFDC benefits to

[8]See, *e.g.*, *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979). We note that New Mexico recognizes as a matter of state law that income acquired during the marriage may be the separate income of the spouse rather than the community property of both spouses (Pet. App. 15a).

parent's other children unless such income is actually available for their support). Petitioner correctly observes (Pet. Supp. 2-4) that the intermediate appellate courts of New Mexico are divided on the validity of the State's community-property regulation. Compare *Barela* v. *New Mexico Department of Human Services*, No. 4059 (N.M. Ct. App. Oct. 30, 1979) (invalidating regulation), with *Duran* v. *New Mexico Department of Human Services*, No. 4350 (N.M. Ct. App. Mar. 4, 1980) (Pet. Supp. App. 1a-12a) (upholding regulation). However, the question has now been certified to the New Mexico Supreme Court. See *Harper* v. *New Mexico Department of Human Services*, No. 4392 (N.M. Ct. App.), certification to the New Mexico Supreme Court (Mar. 5, 1980) (Pet. Supp. App. 13a-14a). If that court determines that the community-property regulation is invalid under federal law, there will be no conflict requiring this Court's consideration. By the same token, if the New Mexico Supreme Court concludes that the regulation is invalid or was invalidly applied as a matter of state law (the issues raised in petitioner's first two "Questions Presented" in this case), there will again be no conflict on the federal question presented here. Finally, in the event that the court in *Harper* sustains the regulation as consistent with federal law, there will be time enough at that point to seek this Court's review of the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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